Petition

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

NO.

LOUIE L. WAINWRIGHT, Secretary,
FLORIDA DEPARTMENT OF
CORRECTIONS,

Petitioner,

vs.

ANTONIO PEREZ,

Respondent.

* * * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * * *

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QUESTION PRESENTED FOR REVIEW

(A) WHETHER A STATE PRISONER IS ENTITLED TO FEDERAL HABEAS CORPUS RELIEF ON A CLAIM OF INEFFECTIVE POST-TRIAL REPRESENTATION BY A PRIVATELY RETAINED ATTORNEY IN THE ABSENCE OF A SHOWING OF THE EXISTENCE OF AN ISSUE OF AT LEAST ARGUABLE MERIT AND/ OR ONE WHICH CASTS DOUBT UPON THE PRISONER'S GUILT, AND; (B) WHETHER THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS IN THE PRESENT CASE CONFLICTS WITH THE OPINION IN UNITED STATES V. DECOSTER, 624 F. 2d 196 (D.C. Cir. 1979) (EN BANC)?

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The order of this Court remanding the case for reconsideration by the Fifth Circuit is reported as Perez v. Wainwright, 447 U.S. 932, 100 S.Ct. 3032, 65 L.Ed. 2d 1127 (1980).

The opinion of the Fifth Circuit on remand is reported as Perez v. Wainwright,

627 F.2d 762 (5th Cir. 1980). The order denying rehearing is reported as Perez v. Wainwright, 640 F.2d 596 (5th Cir. 1981).

JURISDICTIONAL STATEMENT

The judgment of the Fifth Circuit Court of Appeals was entered on October 8, 1980. Rehearing was denied by the court on March 23, 1981. Rehearing en banc was denied by that court on April 30, 1981. The time for filing this petition was twice extended by this Court.

This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defence.

United States Constitution, Fourteenth Amendment:

> No State shall...deprive any person of life, liberty, or property without due process of law...

STATEMENT OF THE CASE

Respondent was convicted in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, before the Honorable George Orr, of robbery, in violation of Florida Statutes (1973) §813.011. On August 14, 1975, he was adjudged guilty and sentenced to be imprisoned for a period of seven years.

Respondent was insolvent at all times and was therefore originally represented in the trial court by the Office of the Public Defender. Subsequently, however, Respondent's representation was undertaken by private counsel who had been

retained by Respondent's parents. It was by this privately retained counsel the Respondent was represented at trial. Following the conviction, no appeal was instituted.

On October 29, 1975, Respondent, represented by a second privately retained counsel, filed a motion in the trial court, which was styled as "POST-CONVICTION RELIEF," and which was apparently intended to function as a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850. In this pleading, it was asserted that "the attorney for the Defendant failed to file the necessary motions as to protect the Defendant to his rights to appeal." This motion was denied on November 12, 1975. (The order of the district court is in error in stating

that this motion was denied on September 15, 1975.) The denial of this motion was not appealed.

On February 17, 1976, Respondent filed a petition in Florida's Third District Court of Appeal seeking a writ of habeas corpus or, in the alternative, that the petition be treated as a timely notice of appeal. In this petition, he asserted that he at all times desired that an appeal be undertaken, that his counsel had informed him at sentencing that he would take the necessary steps to institute an appeal and that he relied upon his counsel to pursue the appeal. This petition was denied on February 19, 1976, due to the fact that Respondent was represented by private counsel at the time of trial.

Respondent instituted the proceeding

from which this case arises by filing a petition for writ of habeas corpus on December 9, 1976, in the United States District Court for the Southern District of Florida, in which he made essentially the same assertions as in the petition filed in the Florida appellate court. Pursuant to an order to show cause, Petitioner filed a memorandum of law and motion to dismiss, in which it was contended that Respondent had not exhausted his state remedies. In an order filed September 1, 1977, setting an evidentiary hearing, Judge Sidney M. Aronovitz rejected that argument. Subsequently, on October 27, 1977, Judge Aronovitz entered an order which concluded that although the fact that Respondent was not able to appeal was not due to state action, Respondent was

entitled to relief because the conduct of his counsel was "so grossly deficient as to render the proceedings fundamentally unfair." This finding was based primarily on the fact that Respondent's counsel at sentencing in seeking supersedeas bond announced to the court that a notice of appeal had already been filed, although this was not the case. Petitioner timely sought rehearing, or, in the alternative, a stay pending appeal. On December 1, 1977, an order was entered denying rehearing and granting a stay pending appeal.

Petitioner appealed to the United States Fifth Circuit Court of Appeals, which reversed the district court, holding that Respondent had exhausted state remedies, but finding that fundamental unfairness had not occurred.

Respondent sought review in this Court, which vacated the Fifth Circuit's judgment and remanded the case for reconsideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980).

On remand, the Fifth Circuit, without calling for further briefs affirmed on the authority of Cuyler v. Sullivan. On rehearing, the court allowed the filing of additional briefs and in denying rehearing, rejected the positions taken by Petitioner that a distinction exists between appointed and retained counsel on appeal and that when a claim of ineffectiveness is not directed to trial representation, the existence of an issue of at least arguable merit must be demonstrated to entitle a federal habeas corpus petitioner to relief.

REASONS FOR GRANTING THE WRIT

A

In Cuyler v. Sullivan, 446 U. S. 335 (1980), this Court dealt with a claim of ineffective representation due to an allegation that the defendant's attorneys had a conflict of interest when they represented him at his state court trial.

This Court made it quite clear that in order for Sullivan, the defendant in the case, or any other state defendant to be entitled to federal habeas corpus relief, he must show the existence of state action.

> A state prisoner can win a federal writ of habeas corpus only upon a showing that the State participated in the denial of a fundamental right protected by the Fourteenth Amendment.
>
> 447 U.S. at 342-343 (emphasis added).

Since Sullivan'a lawyers were privately retained, and since Sullivan did not allege that state officials knew or should have known that his lawyers had a conflict of interest, this Court noted that the question that had to be initially dealt with was "whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment." 446 U.S. at 343 (emphasis added).

In answering this question in the affirmative, this Court noted and relied upon the fact that "a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment." 100 S.Ct. at 1715. Accordingly, this Court concluded that

"[s]ince the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed cousel. . ." 446 U.S. at 344-345 (emphasis added). In short, this court found inherent state action in ineffective trial representation.

The present case deals with the question of whether the reasoning of Cuyler v. Sullivan should also extend to claims of post-trial ineffectiveness.[1] Numerous factors support the conclusion that is should not.

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[1]The Fifth Circuit did not consider this claim, finding that since no appeal was taken, the ineffectiveness here occurred at the trial level. This reasoning is clearly invalid. The thrust of the argument that Cuyler v. Sullivan applies only

First of all, the State does not initiate an appeal from a conviction, as is the case with a trial, a factor upon which the Court in Cuyler v. Sullivan relied. Thus, a defendant on appeal is not embroiled in a proceeding in which he has no desire to participate or choice not to participate. Rather, the proceeding is one the institution of which the State has no control over whatsoever.

Second, while it is true that a State "conducts" an appeal in the sense that

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to trial representation is based on, as will be subsequently detailed, the nature of the trial itself, not the level of the court. Obviously, once the trial is over, the considerations set forth herein by Petitioner come into play, regardless of whether the challenged act or omission occurs in the trial court or in the appellate court.

the appellate court is a state agency or department, it must also be considered that the State conducts appeals only as an added benefit to defendants convicted in the state trial courts. It is under no obligation to hear appeals at all, as the Supreme Court has held that review by an appellate court is not a necessary element of due process. McKayne v. Durston, 153 U.S. 684 (1894). Accordingly, the Court has recognized that there is no federal constitutional right to state appellate review of state criminal convictions. Estelle v. Dorrough, 420 U.S. 534 (1975). Since the State is not required to do anything at all in this regard, the mere fact that it "conducts" the appeal in one sense of the word cannot in itself establish state action. In the present case, the

lack of state action is even more clear than in most claims of ineffective appellate counsel. Since here no appeal was even instituted, there was no proceeding for the State to conduct. Thus, even this factor is absent in the present case.

The third point to consider is that in Cuyler v. Sullivan, the Court required a showing of state action in the denial of a fundamental right. As noted previously, an appeal is not a constitutional right at all, much less a fundamental one. Estelle v. Dorrough, supra; McKayne v. Durston, supra. Moreover, even putting aside the precedential factors, the differences between a claim of ineffective trial counsel and one of ineffective appellate counsel are of such a nature that the latter situation clearly presents a much less fundamental issue.

The right to a fair trial is one of

the most fundamental constitutional rights, protected in various ways by numerous provisions of the Constitution. No portion of the Constitution, however, even mentions specifically the rights of a defendant on appeal.

At trial, every defendant is bathed in apresumption of innocence and the burden of proof rests with the prosecution. Ineffective representation at that point must therefore be dealt with strictly, in light of the posture in which a case must be viewed at that stage of the proceedings. On appeal, the opposite is true. It is presumed that no error has occurred and it is the obligation of the defendant to demonstrate error.

As a result, the number of criminal appeals in which a defendant is successful is not great, regardless of the quality of appellate counsel. Therefore incompetent

representation will seldom have a detrimental effect. In this regard, it should be noted that in a law review article adopted by the Fifth Circuit as an addendum to its internal operating procedures manual, Judge John C. Godbold, of that court, cited statistics from the court's 1975-76 court year which presumably reflect approximate percentages of reversals of appellate courts in general. Those statistics showed that only 10.8 percent of criminal appeals resulted in reversal. Godbold, Twenty Pages and Twenty Minutes-Effective Advocacy on Appeal, 30 Southwestern Law Journal 801 at 803. In addition, of that 10.8 percent, undoubtedly a reasonable number would involve fundamental error, for which relief can be obtained by post-conviction collateral attack, regardless of

what happened on appeal,[2] thus allowing a defendant to achieve the same result.

There is also another crucial distinction between representation at trial and on appeal regarding the effect of incompetent representation. When an attorney at trial incompetetently represents his client, whether by failing to raise a defense or an objection, raising an improper defense, failing to prepare adequately, or for whatever other reason, the result is generally that the evidence that is presented to the trier of fact almost compels a conviction. On appeal, however, no matter how badly an attorney handles a case, the court will reach its conclusions

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2 This is clearly true in Florida. See O'Neal v. State, 308 So.2d 569 (Fla. 2d DCA 1975). See also Sanders v. State, 386 So.2d 256 (Fla. 5th DCA 1980); Skinner v. State, 366 So.2d 486 (Fla. 3d DCA 1979); Dozier v. State, 361 So.2d 727 (Fla. 4th DCA 1978); Young v. State, 177 So.2d 345 (Fla. 2d DCA 1965).

based on the law. Briefs and arguments are merely methods by which parties to an appeal call the court's attention to those theories and precedents that they feel apply to the facts of the case. An appellate court will adopt those positions it finds to be legally correct, regardless of how well written a brief may be or how eloquent an oral argument may be presented. Moreover, an appellate court may employ a line of reasoning not advanced by either party if it finds such action to be appropriate. This is in contrast to the role of the trier of fact at trial, who may not go beyond the evidence presented in reaching a verdict.

The sum of these distinctions is that the role of counsel on appeal is of much less importance than is the role of counsel at trial. Where counsel does a competent job in handling an appeal, certainly

things are easier for the court and justice is expedited. But where counsel fails to do so, the system is such that the appellate judges will often compensate for counsel's shortcomings, slowing down the process, but ending up with the same conclusion, one based on the law and not just on what is presented to the court.

The less fundamental nature of effective appellate counsel was implicitly recognized in Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1977), vacated en banc on other grounds 579 F.2d 317 (5th Cir. 1978), in noting that "while we might hesitate to give effect to a waiver that purported to permit counsel to fail to prepare a defense, a waiver of effective assistance on appeal is far less drastic." 564 F.2d at 1131.

Therefore, given the nature of the

role of counsel on appeal, the non-fundamental nature of the rights involved, the reversal of the presumptions and burdens that exist at trial and the fact that in very few cases will incompetent representation on appeal compel a different result than that which would otherwise be obtained, Petitioner submits the "inherent state action" concept of Cuyler v. Sullivan to appeals would be unwarranted.

It is of course true that while an appeal is not a fundamental right, it is a vehicle by which violations of such rights may be remedied. It must be remembered, however, that declining to extend Cuyler v. Sullivan to appeals would not preclude relief for such violations, since as noted in footnote one, they can be raised by collateral attack.

It is hard to imagine how "fundamental unfairness" can be found when a defendant does not receive an appeal when whatever fundamental claims he might have can still be considered. To do otherwise would be to ignore the import of the word "fundamental," a word used in Cuyler v. Sullivan to describe the rights involved that compelled the Court's conclusion. Such a conclusion is plainly not supportable and it should therefore be held that Cuyler v. Sullivan does not apply to a situation such as that presented here in which a claim is made of ineffective appellate representation.

Given these factors, it is clear that a substantial question exists as to whether the rationale expressed by this court in Cuyler v. Sullivan should extend to assertions of post-trial

ineffectiveness. Until this Court answers that question, significant confusion will exist. This Court should thus grant certiorari to deal with the issue.

B

Even if it is assumed that Cuyler v. Sullivan does apply to post-trial representation, a substantial question exists as to what standard should apply to review claims of ineffective representation, as this Court has never dealt with this issue when counsel's performance is " 'untrammelled and unimpaired' by state action." United States v. DeCoster, 624 F.2d 196, 202 (D.C. Cir. 1979) (en banc). Perhaps the most significant aspect of this question is whether a state prisoner is entitled to a relief on a claim of ineffective post-trial representation in the absence of a showing that there exists an issue of at least arguable merit and/or one which casts doubt upon the prisoner's guilt.

It is true that ordinarily such a

showing is not required. In the situation dealt with here, however, no actual state action is present and the prisoner has available, as noted previously, other avenues to correct any fundamental error that may have occurred. (See footnote two, supra).

The Fifth Circuit noted the existence of numerous minority views calling for such requirement in even the less compelling circumstances than are presented here. See Rose v. Mitchell, 443 U.S. 545, 574-588 (1979) (Stewart, J., concurring; Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring); Kaufman v. United States, 394 U.S. 217, 231 (1969) (Black, J., dissenting). See also United States ex rel. Barksdale v. Blackburn, 616 F.2d 254 (5th Cir. 1981)

(en banc); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970). See generally Note, Guilt, Innocence and Federalism in Habeas Corpus, 65 Cornell L. Rev. 1123 (1980).

Other cases have also expressed similar sentiments. See United States v. Timmrick, ___U.S.___, 99 S.Ct. 2085 (failure to inform defendant of minimum mandatory parole term upon accepting guilty plea not cognizable on collateral attack when claim is only as to technical violation of rule requiring that a defendant be so informed and not that defendant was actually unaware of term); Hill v. United States, 368 U.S. 424 (1962) (failure to ask defendant whether he has anything to say before sentencing not cognizable on habeas corpus as it is not fundamental or

constitutional right and claim regarding such failure does not attack sentence itself); Ennis v. Le Fevre, 509 F.2d 1072 (2d Cir. 1977) (lawyer's decision not to raise identification issue on appeal rendered harmless error in failing to provide transcript relevant to issue, but ineffective assistance might have been found had argument had "obvious merit." 509 F.2d at 1076).

The Fifth Circuit's conclusion that it need not be shown that there exists an issue of at least arguable merit also conflicts with the holding of United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1979) (en banc), which requires a showing of probable prejudice to warrant relief on a claim of ineffective representation. 624 F.2d at 206. Obviously, if the existence of an issue of at least arguable

merit is not shown, it cannot be said that such probable prejudice exists, particularly given, as noted previously, the low percentage of reversals in criminal appeals and the availability of relief if fundamental error was committed. The conflict between the present case and DeCoster is thus quite real and should be resolved by this court.

CONCLUSION

There exists a significant question as to whether a state prisoner may obtain federal relief based on a claim of ineffective post-trial representation by retained counsel. If such a prisoner can obtain such relief, the standards to be applied need to be established and the question of whether a showing of prejudice, in the sense of the existence of an issue of arguable merit and/or of one relating to guilt, is necessary needs to be answered. Similarly, the conflict between the opinion in the present case and that in United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc) needs to be resolved. This Court should therefore grant certiorari to deal with these matters.

Respectfully submitted,

JIM SMITH
Attorney General of
the State of Florida

ANTHONY C. MUSTO
Assistant Attorney
General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to KAREN GOTTLIEB, Assistant Public Defender, 1351 Northwest 12 Street, Miami, Florida 33125 on this 28th day of August, 1981.

ANTHONY C. MUSTO
Assistant Attorney
General

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APP. 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-2219-CIV-SMA

ANTONIO PEREZ, PETITIONER

vs.

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation,
RESPONDENT

ORDER SETTING EVIDENTIARY HEARING
Filed Sept. 1, 1977

Antonio Perez brings this Petition for Habeas Corpus attacking a seven year sentence imposed by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on August 14, 1975. Sentence was imposed pursuant to a jury verdict of guilty to the offense of robbery.

Petitioner is presently in the custody of the Respondent, Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Florida.

As the sole ground for relief, Petitioner alleges that his privately retained

counsel failed to timely invoke the jurisdiction of the appropriate Florida appeals court after promising Petitioner to do so, rendering counsel's assistance ineffective and depriving Petitioner of due process of law.

II

The record reveals that Petitioner never appealed his conviction. Petitioner filed a Motion to Vacate and Set Aside Judgment pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which was denied on September 15, 1975. Thereafter, Petitioner filed a Petition for Writ of Habeas Corpus or in the Alternative Motion to Treat as Timely Notice of Appeal with the Florida District Court of Appeals, Third District. Such petition was denied on February 19, 1976.

The issue presented in the instant petition was not included in Petitioner's Motion to Vacate in the trial court, but

was the gist of Petitioner's habeas petition in the Third District Court of Appeals. The Court of Appeals order dismissing the Petition stated: ". . .it is ordered that the said petition is denied as the petitioner was represented by private counsel at the time of trial." (Case No. 76-277).

III

It is no secret that the Florida courts are not receptive to a claim of ineffective private counsel. U.S. ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976). Nevertheless, Respondent asserts that the Petitioner has failed to exhaust state remedies and should do so via a petition for habeas corpus in the Florida Supreme Court. Respondent argues that the Florida Supreme Court has not had the opportunity to rule on this question since Capetta v. Wainwright, 203 So.2d 609 (1967). The court notes that the Court in Capetta relied on a Fifth Circuit decision, King

Wainwright, 368 F.2d 57 (1966), for the proposition that a private counsel's failure to perfect an appeal for his client did not constitute a denial of due process. However, as pointed out in a later Fifth Circuit case, the majority of decisions for sometime made no distinction between private and court-appointed counsel in considering ineffectiveness of counsel questions. Breedlove v. Beto, 404 F.2d 1019, 1020 (1968). As early as 1962, the Fifth Circuit had articulated the majority position. Porter v. United States, 298 F.2d (5th Cir. 1962). Thus, while the Fifth Circuit's position was in doubt at the time of the Capetta decision, the Florida Supreme Court decision was against the weight of authority.[1] Moreover,

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[1] At any rate, the decisions of the Fifth Circuit do not bind the Florida state courts. See Bradshaw v. State, 286 So.2d 4 (Fla. 1973), cert. denied, 417 U.S. 919, 94 S.Ct. 2626, 41 L.Ed.2d 225 (1974); Stonom v. Wainwright, 235 So. 2d 545 (Fla. App. 1970).

the Florida Appellate courts continue to deny the firmly established Fifth Circuit law which recognizes claims of ineffective private counsel at both the trial and appellate stage. U.S. ex rel. Reis v. Wainwright, supra.[2]

The case of Lamberti v. Wainwright, 513 F.2d 277 (5th Cir. 1975) does not patently vitalize Respondent's exhaustion argument. In that case, the court stated at 283:

> "Lamberti only urged the state courts to see that the trial judge had deprived him of his appeal by misleading his counsel; he never suggested a theory on which the state courts could afford him relief from the effects of any errors of his privately retained counsel. Since his ineffective assistance of retained counsel theory is not the substantial equivalent of his 'judicial thwarting' ground

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[2] "In an uninterrupted line of cases Florida has steadfastly refused to recognize incompetence of privately retained counsel as a valid basis for post-conviction relief." Id. at 1272.

> comity compels us to the conclusion that the district court erred in entertaining Lamberti's ineffective counsel argument before it had been adequately presented to the state courts."

Unlike Lamberti, the Petitioner in the instant case clearly presented the issue of ineffective private counsel in his habeas petition filed with the Florida District Court of Appeals. In fact, the decision denying his petition, as previously mentioned, was based on the fact that he was represented by private counsel at trial. The only logical conclusion is that the issue presented herein was adequately presented to the Florida appellate court but rejected as an unrecognized ground for post-conviction relief.

In addition, remanding for further exhaustion poses the danger that the Florida Supreme Court would dismiss a petition for habeas corpus on grounds of res judicata. As stated in Jenkins v.

Wainwright, 322 So.2d 477, 478 (Fla. 1975):

> ". . .[O]nce a petitioner seeks relief in a particular court by means of a petition for extraordinary writ, here habeas corpus, he has picked his forum. He is not entitled to a second or third opportunity for the some relief by the same writ in a different court. Once he has picked his forum, his remedy is by the appropriate appellate process and not by another petition for an extraordinary writ."

See also Lamberti v. Wainwright, 284 So. 2d 202 (Fla. 1973). Under these circumstances, "[n]either the statute nor the spirit of needed comity behind it require such a formalistic waste of precious judicial energy, state or federal." Reed v. Beto, 373 F.2d 723, 725 (5th Cir. 1965).

IV

Every convicted person has an absolute right to appeal. Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L. Ed.2d 21 (1961). The Supreme Court later mandated that every convicted person has

the right to counsel on appeal. Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 8 L.Ed.2d 811 (1963). The Sixth Amendment right to counsel and the Sixth Amendment incorporated into the Fourteenth Amendment Due Process Clause guarantee each defendant the right to effective assistance of counsel. Id. For a long time a distinction was made between privately retained and court-appointed counsel for purposes of claims of ineffective assistance of counsel. See e.g., King v. Wainwright, supra; Breedlove v. Beto, supra. However, in recent years the Fifth Circuit has abolished the distinction, although different standards have been maintained. Fitzgerald v. Estelle, 505 F.2d 1334 (1975).

> Although no attempt at harmonizing these lines has been previously made, they are not necessarily at odds. Our reconciliation stresses the importance of recognizing the constitutional framework upon which the particular claim of ineffective assistance of counsel

in a state court is to be based. The first question to be asked must be whether the case involves the Fourteenth Amendment due process clause standing alone, or the Sixth Amendment right to counsel incorporated in Fourteenth Amendment due process.[1] The conviction of a defendant after a trial that is fundamentally unfair, whatever the cause of such unfairness, violates Fourteenth Amendment due process. See e.g., the mob domination cases: Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915)(Holmes, J., dissenting), and Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923); the conviction of an accused person while he is legally incompetent: Pate v. Robinson, 383 U.S. 375, 388, 86 S.Ct. 836, 838, 15 L.Ed. 2d 815 (1966) and a conviction predicated upon no evidence at all: Thompson v. City of Louisville, 362 U.S. 119, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). Whenever a defendant has been convicted as the result of such a gross malfunction, the result is that the state's criminal justice system has operated to deny due process. Requisite Fourteenth Amendment state action is present, not because a state official knew the particulars of the unfairness or

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[1] Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

> because retained counsel is deemed a state official, but because the system has failed, and the state's consequent imprisonment or fine of the defendant is fundamentally wrong.[2] In the same manner, whenever a lawyer's ineffectiveness has rendered a trial fundamentally unfair, whether he be retained or appointed and whether his action or inaction was known or unknown to state trial officials, a deprivation of Fourteenth Amendment due process results from enforcement of the resultant judgment.
>
> Moving from the Fourteenth Amendment alone to the incorporated Sixth, our decisions established that the

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[2] Porter v. United States, supra, from the first line of decisions, is a good example of this type of case. There the attorney retained by the defendant represented conflicting interests. His allegiance to the defendant was divided by his attempt to protect an adverse witness in another proceeding. Holland v. Henderson, supra, involved facts similar to Porter. In Bell v. Alabama, supra, the petitioner averred that his counsel induced him to produce him to present no defense at all and that his "trial" consisted only of an appearance in court, and "introduction to the jury" and the pronouncement of a 25 year sentence.

standard of reasonably effective assistance of counsel, most recently delineated in Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), covers a greater range of counsel errors than does the fundamental fairness standard of the due process concept solely embodied within the Fourteenth Amendment. The circumstances in which the state will be bound by retained counsel's failure to meet the Sixth Amendment standard of effectiveness (when the resulting trial cannot be characterized as fundamentally unfair) must be assessed more strictly lest we place a procedurally intolerable and practically impossible burden upon trial judges, who have no control over the selection of counsel employed by a defendant. The only reasonable judicial checkrein--questioning of the tactics and strategy of retained counsel throughout a trial--would freight the bench and bar alike and many times would be counterproductive for the defendant. Without such interrogation of the defendant's lawyer, the court could never know whether his actions or inactions were deliberate or forgetful, brilliant or inept.

To find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state

> official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action, the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so. Furthermore, if the incompetency of a retained attorney's representation is so apparent of the state should have been aware of and could have corrected it then again the state action requirement is satisfied.3
>
> Id. at 1336-37

It is well established that failure of counsel to perfect an appeal is a denial

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3 The factual situation in most of the second line of cases set out above are not detailed in the court's opinions. To the extent that such factual situation could stand for the rationale that even retained counsel action which rendered the trial fundamentally unfair could not be reached absent some showing of state knowledge or participation, those cases are here overruled.

of constitutionally effective counsel. Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972); Atilus v. United States, 406 F.2d 697 (5th Cir. 1969); Cantrell v. State of Alabama, 546 F.2d 652 (5th Cir. 1977). See also, Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975); and Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975). These latter two cases have interpreted the duties of retained counsel with respect to appeals in light of Fitzgerald, supra.

In his petition, Petitioner asserts that private counsel informed him that an appeal would be perfected by the filing of a notice of appeal, and that at all times Petitioner relied on private counsel to perfect his appeal. Petitioner contends he was never contacted by counsel, although Petitioner was at all times desirous of pursuing his appeal. Respondent, on the other hand, alleges that

private counsel informed the Petitioner that no appeal would be taken of his conviction unless he was compensated for the legal services already rendered for trial. Petitioner, further states through an affidavit of his parents that they in fact paid private counsel for services rendered. Thus a factual dispute is manifest and in order to resolve this case in light of the above cited law, an evidentiary hearing is required. Townsend v. Sain, 372 U.S. 293 (1962).

Accordingly, it is

ORDERED AND ADJUDGED that an evidentiary hearing be held in this cause before the Honorable Peter R. Palermo, United States Magistrate on October 12, 1977 at the U.S. Courthouse and Post Office, 300 N.E. 1st Avenue, Miami, Florida (COURTROOM 253) at 10:00 AM.

It appearing from the petition for writ of habeas corpus that the Petitioner,

Antonio Perez is confined in the Union Correctional Institution at Raiford, Florida, and that it is necessary for said defendant to be before this Court for said proceeding;

NOW THEREFORE, this is to command the Respondent, Louie L. Wainwright, Secretary, Department of Offender Rehabilitation that you have the body of said Antonio Perez now detained in custody as aforesaid, under safe and secure conduct, before this Court at Miami, Florida by or before 10:00 A.M. on October 12, 1977 for purpose of an evidentiary hearing. It is further

ORDERED that Petitioner Antonio Perez be brought to Dade County, Florida at least five (5) days prior to said evidentiary hearing so that he may have time to confer with his counsel.

Upon competition of said proceedings you will return subject with all convenient

speed, under safe and secure conduct to the custody of the Warden of the aforesaid penal institution.

DONE AND ORDERED at Miami, Florida, this 1 day of September, 1977.

/s/ Sidney M. Aronovitz
United States District Judge

cc: Karen M. Gottlieb
Assistant Public Defender

Sidney M. Pertnoy
Assistant Attorney General

Louis L. Wainwright, Secretary,
Department of Offender Rehabilitation

APP. 17

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-2219-CIV-SMA

ANTONIO PEREZ, PETITIONER,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,
RESPONDENT,

ORDER--FILED Oct. 27, 1977

Antonio Perez brings Petition for Habeas Corpus attacking a seven year sentence imposed by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida on August 14, 1975. Sentence was imposed pursuant to a jury verdict of guilty to the offense of robbery.

Petitioner is presently in the custody of the Respondent, Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Florida.

As the sole ground for relief, Petitioner alleges that his privately retained

counsel failed to timely invoke the jurisdiction of the appropriate Florida appeals court after promising Petitioner to do so, rendering counsel's assistance ineffective and depriving Petitioner of due process of law.

The record reveals that Petitioner never appealed his conviction. Petitioner filed a Motion to Vacate and Set Aside Judgment pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, which was denied on September 15, 1975. Thereafter, Petitioner filed a Petition for Writ of Habeas Corpus or in the Alternative Motion to Treat as Timely Notice of Appeal with the Florida District Court of Appeal, Third District. Such petition was denied on February 19, 1976.

The issue presented in the instant petition was not included in Petitioner's Motion to Vacate in the trial court, but was the gist of Petitioner's habeas

petition in the Third District Court of Appeal. The Court of Appeal order dismissing the Petition state: ". . .it is ordered that the said petition is denied as the petitioner was represented by private counsel at the time of trial."(Case No. 76-277). Based on these facts and the history of the Florida courts' treatment of the post-conviction claim of ineffective private counsel, this court, in its previous order signed on September 1, 1977, rejected the respondent's contention that petitioner should be required to further exhaust state remedies. The court relied on U.S. ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976) for this position. The court further ordered that an evidentiary hearing be held before Magistrate Peter R. Palermo on October 12, 1977 in order to resolve factual disputes evident from the record. Significant to the court's determination,

examination of the record and the findings of fact reveal that petitioner's privately retained counsel indicated to the state trial court at the sentencing proceeding that a notice of appeal had been filed, and further indicated to the petitioner subsequent to that proceeding that he would be prosecuting petitioner's appeal for him. No further contact was had between petitioner and his attorney, and no action was ever taken by counsel to perfect or prosecute petitioner's appeal. Petitioner was at all time indigent, albeit managed to obtain a private attorney at trial only through the assistance of his parents. He at all times relied on his attorney to perfect and prosecute his appeal.

Petitioner contends that his attorney's representation in open court that he had already filed a notice of appeal was sufficient to constructively notify the

judge, the prosecutor or the clerk of counsel's ineffectiveness so as to imbue his subsequent deprivation of appellate rights with state action. Petitioner relies on Cantrell v. Alabama, 546 F.2d 652 (5th Cir. 1977) and Flanagan v. Henderson, 496 F.2d 1274 (5th Cir. 1974) to support his position. We cannot agree. Clearly, Cantrell involved a substantially greater degree of state involvement than present in the case at bar:

> "The highest legal officer of the state, by a written motion, called to the attention of the Supreme Court and the appellant's retained counsel a defect which under Alabama law, if unremedied, would require that the appeal be dismissed without consideration of its merits. The Attorney General asked for and secured dismissal of the appeal because of the mistake." Id. at 654.

In Flanagan,

> ". . .[S]ince the default of one of his attorneys in properly perfecting a full appeal was promptly made

> known to the trial judge in the form of a request for extension of time to perfect a regular appeal, state involvement unquestionably is present here." Id. at 1278.

In the instant case, suffice it to say that the attorney's announcement is open court that he has filed a notice of appeal is insufficient to constructively apprise the court that a defendant's appellate right may not be perfected at all in the future.

However, the landmark case of Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. 1974) provides that privately retained counsel may be ineffective within the purview of the Fourteenth Amendment's protections in another manner:

> ". . .[W]henever a lawyer's ineffectiveness has rendered a trial fundamentally unfair, . . .whether his action or inaction was known or unknown to state trial officials, a deprivation of Fourteenth Amendment due process results from enforcement of the resultant judgment."

Postal v. Beto, 508 F.2d 679 (5th Cir. 1975) was the first case to interpret Fitzgerald standards as applied to claims of ineffective privately retained appellate counsel. Petitioner in that case claimed that the failure of his counsel to appear at sentencing and advise him of his right to appeal rendered his assistance ineffective. The Court held to the contrary:

> "[W]e have carefully examined the record and determined that the District Court had ample basis for concluding that the actions of retained counsel did not operate to deprive the trial of fundamental fairness as required by the Fourteenth Amendment."

In Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975), the court felt compelled by Postel to hold that counsel's conduct was not "so grossly deficient as to render the proceedings fundamentally unfair, "Fitzgerald, supra, 505 F.2d at 1337."

In Malone, retained counsel gave oral notice of appeal but failed to file a brief, resulting in the dismissal of his client's appeal without opinion. Finally, in Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975), retained counsel gave notice of appeal in open court but failed to pursue his client's appeal without notice when he realized he would not be paid what he considered a reasonable fee. Petitioner's appeal was dismissed as a result of counsel's failure to file an appellate brief. The court in Kallie felt bound by the decision in Malone to find that the petitioner was not denied fundamental fairness in the proceedings.

In the instant case counsel announced in open court that a written notice of appeal had already been filed,* although

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* Florida Appellate Rule 6.4 mandates that an appeal may be taken only by filing with the clerk of the lower court a

no such notice was ever filed. This court finds this to be a crucial distinction from Postel and its progeny. Such an active course of conduct on the part of private counsel, can only be characterized, at the very least, as a wilful disregard for the responsibility placed upon him by the system, which served only to insure the deprivation of petitioner's appellate rights. Such unconscionable actions languish to the level of conduct of counsel "so grossly deficient as to render the procedings fundamentally unfair

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notice in writing that the appellant appeals from a judgment, order, ruling, or sentence, as the case may be.

Such a notice would be untimely as preture under Florida Appellate Rule 6.2 which provides:

> Any appeal by the defendant from the judgment or sentence shall be taken within 30 days after the sentence is entered, provided that the defendant may take an appeal from the judgment within 30 days after the judgment is entered. (Emphasis added).

For these reasons, it is

ORDERED AND ADJUDGED that unless the state appellate court grants Petitioner belated appeal of his conviction within ninety (90) days of this order, this Court will grant Petitioners Writ of Habeas Corpus.

DONE AND ORDERED at Miami, Florida, this 26 day of October, 1977.

/s/ Sidney M. Aronovitz
United States District
Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-2219-Civ-SMA

ANTONIO PEREZ, PETITIONER,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,
RESPONDENT

ORDER--Filed Dec. 1, 1977

Antonio Perez filed a Petition for Writ of Habeas Corpus pursuant 28 U.S.C. §2254. In accordance with this Court's order of September 1, 1977, an evidentiary hearing was held on October 12, 1977 before United States Magistrate Peter R. Palermo. The petitioner and his father testified at the hearing. Petitioner's state court trial counsel, the subject of alleged incompetence, did not testify. The Magistrate set out his findings of fact and recommendation, which in substance reflected that private counsel advised the state trial

court at sentencing that a notice of appeal had been filed, and further advised petitioner that he would represent him on appeal of his conviction. In addition, it was found by the Magistrate that no notice of appeal was ever filed, although petitioner continued to rely on private counsel to pursue the appeal, and at all times desired to appeal. Petitioner only found out that no notice of appeal had even been filed subsequent to the requisite filing period. Petitioner has never been granted an appeal of his conviction by the State of Florida, and was indigent at all times subsequent to his conviction. Based on these findings, the Magistrate recommended to the undersigned that counsel's conduct rendered the proceedings fundamentally unfair, entitling petitioner to habeas corpus relief, as outlined in Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). The undersigned

after an independent review of the record and applicable law in this Circuit, ordered on October 26, 1977 that unless the state appellate court grants petitioner a belated appeal within ninety days, the Writ of Habeas Corpus will issue. Respondent has now filed a Petition for Rehearing or Alternatively, Motion for Stay Pending Appeal.

Respondent presents two factors for this Court's consideration. First, respondent contends that Williams v. State, 324 So.2d 74 (Fla. 1975) colors private counsel's representation to the state court at sentencing in a different light than described in this Court's previous order. Specifically, respondent argues that counsel's representation should be viewed simply as a case of "mistaken impression." The Court is unpersuaded by this argument. Initially, the Court notes that Williams v. State, supra was decided on December

3, 1975 while the proceeding at which private counsel asserted a notice of appeal had been filed was held on August 14, 1975. Moreover, suffice it to say that "premature" as utilized in the context of Williams, supra is inapposite to the case at bar. Herein, counsel's assertion implied that a notice of appeal had been filed prior to the adjudication of guilt and pronouncement of sentence. Williams, supra, even if applicable, does not illustrate that if counsel had filed the notice of appeal prior to the sentencing proceeding, it could have been treated as timely filed.

More importantly, counsel's conduct only served to insure that the petitioner would be denied his right to appeal his conviction. The sentencing transcript reveals that immediately following the court's adjudication of guilt and pronouncement of sentence, private counsel

stated the following:

> THE COURT: . . .I'll adjudicate the defendant guilty, sentence him to seven years in the State prison.
>
> MR. NEGRETTI: Your Honor, at this time, Judge, we already filed a notice of appeal. We ask for a supersedeas bond.

The transcript goes on to reveal that the trial judge never informed the petitioner concerning his rights of appeal, contrary to Florida Rule of Criminal Procedure 3.670.[1] In this Court's view, counsel, by his misrepresentation, foreclosed whatever potential may have then existed for

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[1] In pertinent part, Rule 3.670 provides: "When a judge renders a final judgment of conviction, withholds adjudication of guilt after a verdict of guilty, imposes a sentence, grants probation or revokes probation, he shall forthwith inform the defendant concerning his rights of appeal therefrom, including the time allowed by law for taking an appeal." As to the effect of noncompliance with this rule, see Nichols v. Wainwright, 243 So.2d 430 (Fla.App.2d 1971); compare with Baker v. State, 224

compliance by the trial judge with Rule 3.670. As a practical matter, any likelihood of inquiry by the court or manifestation of indigency and desire to appeal by the petitioner necessary to invoke the mandate of Douglas v. California, 373 U. S. 353 (1963) was substantially lessened by this false representation. The sensitive and crucial nature of the stage of the proceedings at which counsel's misrepresentation occurred needs no further elaboration. For these reasons, the Court concludes that counsel's conduct was indicative of a wilful or, at least, reckless disregard of petitioner's rights, and the responsibility placed upon an attorney by the system. As we previously stated, "such unconscionable actions languish to the level of conduct of counsel

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So.2d 331 (3d Dist. 1969). The Supreme Court of Florida has not taken a stand on the substantive effect of a literal noncompliance with 3.670 Robinson v. Wainwright, 245 So.2d 867 (Fla. 1971).

'so grossly deficient as to render the proceedings fundamentally unfair.'" See Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975).

Secondly, respondent contends that petitioner can only be granted relief if the State was apprised of the deficiency of counsel's representation, citing Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975). Again, respondent's argument is without merit. This Court's ruling is based on the law in the Fifth Circuit as established in Fitzgerald v. Estelle, supra at 1336:

> ". . .whenever a lawyer's ineffectiveness has rendered a trial fundamentally unfair, whether he be retained or appointed and whether his action or inaction was known or unknown to state officials, a deprivation of Fourteenth Amendment due process results from enforcement of the resultant judgment." (emphasis supplied)

Malone, supra, did not alter the standard articulated in Fitzgerald.

Finally, respondent has requested this Court to reconsider its ruling on the merits in light of a ruling by another judge in this district on a case similar to this one. In Taylor v. Wainwright, Case No. 77-373-CIV-JLK, Judge Lawrence King dismissed a federal habeas petition alleging ineffective private appellate counsel so that petitioner could further exhaust state remedies by seeking relief in the Florida Supreme Court. However, the instant case is distinguishable from the Taylor case. At page 5 of his order, Judge King stated that "although petitioner attempted to litigate the question of ineffective private counsel in his petition filed with the Third District, the response by the State and the findings of the Commissioner indicated that only the question of a state action denial of petitioner's right to appeal was ever seriously considered." Judge King therefore

concluded that the problem of res judicata would not present itself if Taylor presented his claim to the Florida Supreme Court. See Jenkins v. Wainwright, 322 So.2d 477 (Fla. 1975). However, in the instant case the District Court of Appeal summarily denied petitioner's Petition for Habeas Corpus based on the fact that petitioner was represented by private counsel at trial. In addition, the decision of the District Court reaffirms the position that the Florida courts have taken in regard to claims of ineffective private counsel since 1967 in Capetta v. Wainwright, 203 So.2d 609 (1967). In U.S. ex rel. Reis v. Wainwright, 525 F.2d 1269 (1976), the Fifth Circuit, although giving weighty consideration to principles of comity, would not require the petitioner therein to bring his claim of incompetent trial counsel before the Florida appellate courts. Similarly, given the posture of the

case at bar, this Court cannot countenance what in all likelihood amounts to a waste of judicial energy, both state and federal.

Petitioner's Petition for Rehearing is therefore denied.

The question of whether to grant a stay of this Court's order pending an appeal of the merits rest on a consideration of four factors: 1) the likelihood of success on the merits; 2) whether the movant will suffer irreparable injury if a stay is not granted; 3) whether other parties will be substantially harmed if a stay is granted; and 4) the dictates of the public interest. Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968); Virginia Petroleum Job Ass'n v. Federal Power Commission, 104 U.S. App. D.C. 106, 259 F. 2d 921 (1958). These factors apply when a stay is sought, as in this case, pursuant to Rule 8 of the Federal Rules of

Appellate Procedure. Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). As to the first factor, there appears to be a reasonable chance of success on appeal. Without compromising on what this Court considers to be a sound distinction from prior Fifth Circuit law on the subject,[2] the Court notes that the Fifth Circuit has not yet granted habeas relief on a claim of ineffective appellate private counsel without a demonstration of "state action." Postel v. Beto, supra; Malone v. Alabama, supra; Kallie v. Estelle, supra. Secondly there is no question that if the stay is not granted the respondent will be precluded from appealing this decision on the merits, due to the time limitation imposed. Thirdly, the harm to other parties does not appear to be substantial, as petitioner

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2 Postel v. Beto, 508 F.2d 679 (5th Cir. 1975); Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975); Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975).

is not without appropriate remedy to counterbalance any harm he may suffer from a delay pending appeal. Finally, the dictates of the public interest mandate that the state be permitted an appeal of this case.

For the above stated reasons, it is

ORDERED AND ADJUDGED that the Petition for Rehearing is DENIED, and the Motion for Stay Pending Appeal is GRANTED. This Court's previous order signed on October 26, 1977 is in all respects reaffirmed.

DONE AND ORDERED at Miami, Florida, this 1 day of December, 1977.

/s/ Syndey M. Aronovitz
United States District Judge

cc: Karen Gottlieb, Esq.
Assistant Public Defender
1351 N.W. 12th Street

Anthony C. Musto, Esq.
Assistant Attorney General
8585 Sunset Drive, Suite 75
Miami, Florida 33143

APP. 39

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 78-1346

ANTONIO PEREZ, Petitioner-Appellee

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,
State of Florida, Respondent-Appellant,

OPINION--May 1, 1979

Rehearing and Rehearing En Banc
Denied July 13, 1979

State prisoner filed petition for habeas corpus. The United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., 440 F. Supp. 1037, granted relief, and respondent appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) petitioner had exhausted available state remedies; (2) privately retained counsel's representation in open court at time of sentencing that he had filed notice of

appeal when, in fact, no notice of appeal had been filed was not so clear a warning to the trial court of possibility of dereliction as to result in state action, even though notice of appeal filed prior to sentencing would not have been effective, and thus failure of the appeal did not entitle defendant to relief under the Sixth Amendment on ground of incompetence of counsel, and (3) under controlling precedents, conduct of counsel did not result in such fundamental unfairness as to amount to a denial of due process under the Fourteenth Amendment.

Reversed.

Robert L. Shevin, Atty. Gen., Anthony C. Musto, Margarite Esquiroz, Asst. Attys. Gen., Miami, Florida, for respondent-appellant.

Karen M. Gottlieb, Asst. Public Defender, Bennett H. Brummer, Public Defender, Miami, Fla., for petitioner-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This case requires us to consider once again the constitutional standards by which the actions of counsel retained to defend the accused in a state court proceeding are to be measured when the lawyer has been shown to have been derelict in his duties. Antonio Perez brought this habeas corpus petition attacking a seven year sentence imposed after a jury verdict in a Florida court. The sole ground of error alleged is that retained counsel[1] failed to perfect his appeal, after promising

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[1] Perez was originally represented by the public defender. However, his family retained private counsel, who represented Perez at trial. The public defender has represented Perez in this federal collateral proceeding.

Perez to do so and falsely stating in open court at the time of sentencing that a notice of appeal had already been filed.

After failing to secure habeas relief in the Florida District Court of Appeal, Perez filed a petition with the United States District Court, alleging that he had been denied the reasonably effective assistance of counsel, guaranteed by the sixth amendment, and that the proceeding was rendered fundamentally unfair by his lawyer's failure to perfect an appeal, in violation of his right to due process under the fourteenth amendment. The district court, after finding that Perez had exhausted the available state remedies, held that Perez's sixth amendment rights had not been violated because the state neither knew of counsel's failure nor was involved in his dereliction; however, the court agreed that Perez had been denied

due process of law under the fourteenth amendment, and granted habeas corpus on that basis.

The State has appeal from the order granting habeas corpus, contending that Perez did not exhaust available state remedies and that, under the law of this circuit, counsel's failure to appeal his conviction did not render the proceedings fundamentally unfair. While we agree that Perez exhausted the available state remedies, and that he was not entitled to the protection of the sixth amendment, we are procedent-bound to reverse the grant of habeas corpus.

The court's finding that Perez exhausted available state remedies is manifestly correct. The state pointed out that the Supreme Court of Florida has not had an opportunity to review its 1967 decision in which it rejected incompetence of retained counsel as a valid basis for post

conviction relief. Cappetta v. Wainwright, Fla. 1967, 203 So.2d 609. The premise of the argument is that the Supreme Court of Florida might be disposed to change its view after considering later decisions by this and other courts in which similar claims have been recognized; but we have already considered and rejected this thesis in United States ex rel. Reis v. Wainwright, 5 Cir. 1976, 525 F.2d 1269. We there held that a Florida prisoner was not required to seek any collateral relief in the state appellate system before presenting a claim of incompetent private counsel to the district court. After reviewing Florida authority, we noted that there was no indication that a Florida court would depart from its line of decisions that refused to recognize claims based on the incompetence of retained counsel. The speculation of the State concerning what the Florida Supreme Court

might or might not do if it were presented with Perez's claim,[2] is insufficient reason for us to abandon our decision in Reis. Having found that it was proper to examine the petition, we now review the district court's resolution of the constitutional claims.

In an en banc decision, the circuit examined the relationship between claims based on counsel's dereliction brought

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[2] See also Williams v. Wainwright, 5 Cir. 1971, 452 F.2d 775, where Judge Roney reviewed the relationship between the Florida Supreme Court and the Florida District Courts of Appeal. He found that the state district courts are not intermediate appellate courts, but are intended to be "the 'end of the road' for most appeals." Id. at 776. The Florida Supreme Court will review cases only if "the decision sought to be reviewed conflicts with a decision of the Florida Supreme Court or a decision of a different district court of appeals." Id. at 777. It is clear from Reis that the decision of the district court of appeals with respect to Perez's claim was not in conflict with any decision of the state supreme court or any other district court of appeals. Thus, there is no reason to expect that the state supreme court would even accept Perez's case for review.

under the fourteenth amendment as a result of its direct guarantee of due process and those that invoke it because it also incorporates sixth amendment protection. Fitzgerald v. Estelle, 5 Cir. en banc. 1974, 505 F.2d 1334, cert. denied, 1975, 422 U.S. 1011, 95 S.Ct. 2636, 45 L. Ed.2d 675. The fourteenth amendment guarantee of due process of law is violated only if the conduct of counsel renders the trial fundamentally unfair, whether or not the state is involved in or knows of counsel's failing, "because the system has failed, and the state's consequent imprisonment or fine of the defendant is fundamentally wrong." Id. at 1336.

When the "incorporated sixth" is invoked, there must be state involvement to constitute a denial of the right to counsel:

> To find state involvement in retained counsel's conduct which is adjudged to be less

> than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused. That the trial judge and the prosecutor have such a capacity and duty is unquestionable. Therefore, if the trial judge or the prosecutor can be shown to have actually known that a particular defendant is receiving incompetent representation and takes no remedial action, the state action requirement is satisfied. If they directly participate in the incompetency, it is even more so. Furthermore, if the incompetency of a retained attorney's representation is so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it then again the state action requirement is satisfied. Id at 1337. See also United States v. Childs, 5 Cir. 1978, 571 F.2d 315, 316.

In at least one case decided since Fitzgerald this circuit has granted relief because state trial officials had actual or constructive notice of the private

counsel's incompetence. In Cantrell v. Alabama, 5 Cir. 1977, 546 F.2d 652, cert. denied, 431 U.S. 959, 97 S.Ct. 2687, 53 L. Ed.2d 278, the court found that the state attorney general had actual knowledge of the defective assistance at a time when the attorney's error could have been corrected. Instead of seeking correction of the error (submission of an uncertified transcript), the attorney general moved for dismissal of the appeal on the basis of the mistake. As the district court noted, a substantially greater degree of state involvement and knowledge was evident in that case than is found in this situation.

In contrast, panels of this court have been unable to find sufficient state involvement in other situations. In Malone v. Alabama, 5 Cir. 1975, 514 F.2d 77, cert. denied, 423 U.S. 990, 96 S.Ct. 403, 46 L.Ed.2d 309, the court held that no

state official was aware or should have been aware that the defendant's privately retained counsel had not informed him of his right to appeal in forma pauperis with court-appointed counsel or that the decision to drop the appeal was against the wishes of the defendant. Similarly, in Kallie v. Estelle, 5 Cir. 1975, 515 F.2d 588, cert. denied, 423 U.S. 1019, 96 S.Ct. 455, 46 L.Ed.2d 391, the court decided that it could not charge state officials with constructive notice simply because the defense attorney failed to request a transcript or file a brief after giving an otherwise valid oral notice of appeal. Accord, Edwards v. Louisiana, 5 Cir. 1975, 520 F.2d 321, cert. denied, 1976, 423 U.S. 1089, 96th S.Ct. 882, 47 L.Ed.2d 100.

Perez contends that state trial officials knew or should have been aware of the incompetence of his lawyer when the attorney asserted at sentencing that a

notice of appeal had already been filed when in fact the notice had not been, and never was, prepared. If a notice of appeal had been filed prior to sentencing, it would not have preserved Perez's rights under Florida law as it was interpreted at the time of trial. State ex rel. Faircloth v. Cross, Fla. 1970, 238 So.2d 81; Holmes v. State, Fla. App. 1972, 267 So.2d 344; Florida Appellate Rule 6.2, 32 Fla.Stat.Ann. (West 1967). Compare Williams v. State, Fla. 1975, 324 So.2d 74 (announcing new rule subsequent to Perez's trial that premature filing is not subject to dismissal but does not vest jurisdiction in appellate court until judgment or sentence is rendered).[3] The district court found that the attorney's oral statement

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[3] The lawyer's assertion in court after sentencing was equally ineffective to perfect an appeal, as a written notice of appeal is required in Florida. Florida Appellate Rule 6.4.

to the trial court was insufficient to warn the trial court that something was amiss and cause it to inquire so as to be certain that Perez's appeal would be perfected.

It is apparent that the state was not so clearly appraised of the incompetence of Perez's lawyer as were the state officials in Cantrell. On the other hand, the lawyer's statement that an appeal had already been filed, made at a time when such a notice of appeal clearly was ineffective under the Florida rules, was more of a clue that something might be amiss than the events in Malone, Kallie and Edwards. Yet we cannot say that the warning was so clear or the possibility of dereliction so evident as to find the district court's determination erroneous. Something more is required to constitute state action than the failure of a state official to pick up and follow a scent that might

uncover the fault of a privately retained lawyer. See Fitzgerald, supra, 505 F.2d at 1337.

After rejecting Perez's incorporated-sixth amendment challenge, the district court examined his claim under the fourteenth amendment; as discussed above, the test set forth in Fitzgerald, is whether the action, albeit unknown to state officials, rendered the trial "fundamentally unfair." Id. at 1336.

On three other occasions we have interpreted the direct fourteenth amendment Fitzgerald test with respect to claims that counsel's failure to appeal a state court conviction constituted a taint of fundamental unfairness. In Postel v. Beto, 5 Cir. 1975, 508 F.2d 679, cert. denied, 423 U.S. 853, 96 S.Ct. 100, 46 L.Ed.2d 78, we upheld the denial of habeas relief to a defendant whose lawyer had failed to notify him of his right to appeal. The

court found that the district court "had ample basis for concluding that the actions of retained counsel did not operate to deprive the trial of fundamental fairness." Id. at 680. In Malone v. Alabama, supra, we affirmed denial of habeas relief to a defendant whose counsel gave oral notice of appeal but failed to file a brief with the state appellate court. Finally, in Kallie v. Estelle, supra, we relied on the earlier cases to affirm the denial of habeas to a prisoner whose retained attorney gave oral notice of appeal in open court, but failed to request a transcript and did not present an appellate brief to the trial court as required under Texas law. In Malone and Kallie, retained counsel aborted the defendant's right to appeal by failing in their duty to perfect the appeal after orally notifying the court that an appeal was contemplated.

In the present case, counsel made a false statement in open court when he said that a notice of appeal had already been filed. This was a violation of his duty to the court, but it was no more a violation of his duty to the defendant and created no greater flaw in the trial than did the failure of retained counsel to do what had been promised in Malone and Kallie.

We are therefore unable to agree with the district court that these decisions should be distinguished on the basis that Perez's lawyer's statement in open court that an appeal had already been filed was "an active course of conduct" that could "only be characterized, at the very least, as a wilful disregard for the responsibility placed upon him by the system." The lawyer wilfully disregarded his professional responsibility in all of these cases; the only factual difference here was that counsel misled the court as well as his client.

What is or is not "fundamental unfairness" cannot of course be identified by litmus. Ultimately the characterization is visceral and emotional. Indeed the very term "fundamentally unfair" has pejorative overtones. Were we approaching the issue for the first time, we would hold, as did the district judge, that, when a lawyer, by definition a member of a learned profession and a member of the bar of the court, does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal. The appeal might be fruitless but it would at least be heard.

Our sentiments are repressed by our duty to adhere to the prior decisions that we cannot distinguish. Those decisions also command the course the district court should have taken.

For these reasons, the judgment of the district court granting a writ of habeas corpus, is REVERSED.

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1346

D.C. Docket No. 76-2219-Civ-SMA

ANTONIO PEREZ, PETITIONER-APPELLEE

versus

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

RESPONDENT-APPELLANT

Appeal from the United States District Court for the Southern District of Florida

Before MORGAN, FAY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

May 1, 1979

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1346

ANTONIO PEREZ, PETITIONER-APPELLEE,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

RESPONDENT-APPELLANT,

October 8, 1980.

Appeal from the United States District Court, for the Southern District of Florida; Sidney M. Aronovitz, Judge.

Anthony C. Musto, Marqarite Esquiroz, Asst. Attys.Gen., Miami, Florida, for respondent-appellant.

Karen M Gottlieb, Asst. Public Defender, Miami, Florida, for petitioner-appellee.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

(Opinion 5 Cir., 1979, 594 F.2d 159, ___ U.S. ___, 100 S.Ct. 3032, 65 L.Ed.2d 1127)

Before MORGAN, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge.

Considering the decision of the United States Supreme Court in Cuyler v. Sullivan, 446 U.S.___,____, 100 S.Ct. 1708, 1715-1716, 64 L.Ed.2d 333, the order of the district court, 440 F.Supp. 1037, granting writ of habeas corpus is AFFIRMED and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-1346

ANTONIO PEREZ, PETITIONER-APPELLEE

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

RESPONDENT-APPELLANT.

March 23, 1981

State prisoner filed petition for habeas corpus. The United States District Court for the Southern District of Florida, at Miami, 440 F.Supp. 1037, Sidney M. Aronovitz, J., granted relief, and appeal was taken. The United States Court of Appeals, Fifth Circuit, 594 F.2d 159, Alvin B. Rubin, Circuit Judge, reversed, and petition for writ of certiorari was granted. The Supreme Court, 100 S.Ct. 3032, vacated and remanded. On remand, the Court of Appeals, 627 F.2d 762, affirmed original order of District Court

granting writ of habeas corpus and remanded case. On petition for rehearing, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that when lawyer did not perform his promise to his client that appeal would be taken, fairness required that deceived defendant be granted out-of-time appeal.

Petition denied.

Anthony C. Musto, Marqarite Esquiroz, Asst. Attys.Gen., Miami, Florida, for respondent-appellant.

Karen M. Gottlieb, Asst.Public Defender, Miami, Fla., for petitioner-appellee.

Appeal from the United States District Court for the Southern District of Florida.

ON PETITION FOR REHEARING

Before MORGAN, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Retained counsel for Perez failed to perfect an appeal of Perez's state court

conviction after promising to do so and falsely stating in open court at the time judgment was rendered that an appeal had already been filed. Based on this dereliction, Perez sought habeas corpus. Our original decision denied relief because we were bound by Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974)(en banc), cert. denied, 422 U.S. 1011, 98 S.Ct. 2636, 45 L.Ed.2d 678. Applying the rule of that case, under the Sixth Amendment as made applicable to the states by the Fourteenth Amendment, we found that the state trial court officials had neither actual nor constructive notice of private counsel's incompetence and, therefore, no state action was proved. We also denied relief under the due process clause because the conduct of counsel had not rendered the trial fundamentally unfair. Perez v. Wainwright, 594 F.2d 159 (5th Cir. 1979).

Thereafter, the Supreme Court, in Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed.2d 333 (1980), held that ineffective assistance by a privately retained lawyer can provide the basis for federal habeas corpus relief under the Sixth Amendment.[1] The Court reiterated the principle that a denial of the Sixth Amendment right to counsel can be established only "upon a showing that the state participated in the denial" of that right.

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[1] After its decision in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the Supreme Court, after granting a writ of certiorari in this case, remanded for consideration in light of Cuyler. Perez v. Wainwright, 447 U.S. 932, 100 S.Ct. 3032, 65 L.Ed.2d 1127 (1980). After remand, we affirmed the order of the District Court granting a writ of habeas corpus and remanded for further proceedings, 627 F.2d 762 (5th Cir. 1980). We are now considering this case on the state's petition for rehearing.

Sullivan neither alleged nor proved that state officials knew or should have known of the denial of his right to counsel, as evidenced by a conflict of interest by his counsel. Therefore, the Court was presented with the question "whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment." 446 U.S. at 343, 100 S.Ct. at 1715, 64 L.Ed.2d at 343 (emphasis supplied).

Because a state criminal trial is immanently state action, the court reasoned that the conduct of retained counsel involves state action and held that a conviction obtained in a trial in which the defendant's counsel, whether retained or appointed, is ineffective violates the Sixth Amendment. "Thus, the Sixth Amendment does more than require the States

to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance," 446 U.S. at 344, 100 S.Ct. at 1716, 65 L.Ed.2d at 344 (emphasis supplied). The Court held that the pervasive state involvement in the trial itself does not allow for a distinction to be drawn "between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers." Id.

We are left then with the question whether the failure of Perez's retained counsel to file a timely notice of appeal likewise constitutes a violation of the Sixth Amendment. Many years ago the Supreme Court held that the right to appeal from a criminal judgment is not

guaranteed by the Constitution. McKane v. Durston, 153 U.S. 684, 688, 14 S.Ct. 913, 915, 38 L.Ed. 867 (1894). We assume, without deciding, that evolving standards of due process do not erode the applicability of that decision. Once the state provides an appeal, however, that right cannot be forfeited by counsel who is not only derelict in his obligations to his client but misleads the court of whose bar he is a member. It was counsel's duty to protect the convicted defendant's right to appeal. The duty of counsel in the trial court does not end upon final judgment. A.B.A. Standards, Criminal Appeals: Transition from Trial Court to Appellate Court §2.2 (1970); The Defense Function After Conviction §§8.2, 8.3 (1971); See also Lairson v. Copp, 415 F.2d 352, 353 (9th Cir. 1969). The duty of continuing representation is also imposed by the

Florida courts.[2] The district court, after conducting an evidentiary hearing, found

> [The] active course of conduct on the part of the private counsel, can only be characterized, at the very least, as a wilful disregard for the responsibility placed upon him by the system, which served only to insure the deprivation of petitioner's appellate rights. Such unconscionable actions languish to the level of conduct of counsel "so grossly deficient as to render the proceedings fundamentally unfair."

Perez v. Wainwright, 440 F.Supp. 1037, 1040 (S.D. Fla. 1977)(Emphasis is original), quoting Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1975). This conclusion, fully supported by the record, warrants our finding that counsel's dereliction of duty deprived Perez of a proceeding that was fundamentally fair. Therefore, we now hold, as announced by way of dictum in our first opinion, that "when

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[2] Coleman v. State, 215 So.2d 96-100-101 (Fla. 4th Dist.Ct.App. 1968); Smith v. State, 192 So.2d 346, 349 (Fla. 2d Dist.Ct.App. 1966). See also Rule 3.670 Florida Rules of Criminal Procedure.

a lawyer, by definition a member of a learned profession and a member of the bar of the court, does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal." Perez v. Wainwright, 594 F.2d 159, 163 (5th Cir. 1979).[3]

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[3] Each federal circuit court, even before the Cuyler proclamation of equality, has, under varying circumstances, recognized a denial of due process to defendants whose right to appeal is lost through wrongdoings or neglect of counsel. See, e.g., Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974)(en banc); Sanders v. Craven, 488 F.2d 478 (9th Cir. 1973); Shiflett v. Commonweath of Virginia, 447 F.2d 50 (4th Cir. 1971)(en banc), cert. denied, 405 U.S. 994, [92 S.Ct. 1267, 31 L.Ed.2d 462] (1972); Chapman v. United States, 469 F 2d 634 (5th Cir. 1972); Macon v. Lash, 458 F.2d 942 (7th Cir. 1972); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970), cert. denied, 401 U.S. 1002, 91 S.Ct. 1224, 28 L.Ed.2d 535 (1971); Jackson v. Turner, 442 F.2d 1303 (10th Cir. 1971); Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971); Benoit v. Wingo, 423 F. 2d 880 (6th Cir. 1970), cert. denied, 400 U.S. 852, 91 S.Ct. 45, 27 L.Ed.2d 89

The State argues, however, that under the circumstances here presented, an out-of-time appeal should be granted only in

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(1970); United States ex rel. O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970); Nelson v. Peyton, 415 F.2d 1154 (4th Cir.), cert. denied, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1969); Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969); Byrd v. Smith, 407 F.2d 363 (5th Cir. 1969); United States ex rel Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Dillane v. United States, 350 F.2d 732 (D.C.Cir. 1965); Desmond v. United States, 333 F.2d 378 (1st Cir. 1964).

Various state courts have also found ineffective assistance when the right to appeal has been lost through an error by privately-retained counsel. See, e.g., Finnie v. State, 265 Ark. 941, 582 S.W.2d 19 (1979); Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim.App. 1976); Ex parte Raley, 528 S.W.2d 257 (Tex.Crim.App. 1975); Hopkins v. Hoper, 234 Ga. 236, 215 S.E.2d 241 (1975); Erb v. State, 332 A.2d 137 (Del. 1974); People v. Serrano, 33 Cal. App.3d 331, 109 Cal.Rptr. 30 (1973); State v. Scott, 492 S.W.2d 168 (Mo.App. 1973); Shipman v. Gladden, 253 Or. 192, 453 P.2d 921 (1969); People v. Brown, 39 Ill.2d 307, 235 N.E. 2d 562 (1968).

isolated instances, such as when the petitioner can show that an issue of arguable merit will be raised in state court. No such showing is required. Despite the constant iteration of minority views that doubt concerning guilt should be a predicate to habeas corpus relief,[4] the Supreme Court has not accepted that view. See, e.g., Rose v. Mitchell, 443 U.S. 545, 559-564, 99 S.Ct. 2993, 3002-04, 61 L.Ed.2d 739 (1979).

The State seeks to distinguish Cuyler v. Sullivan from the failure of Perez's lawyer to appeal because Sullivan received

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[4] See, e.g. Rose v. Mitchell, 443 U.S. 545, 574-588, 99 S.Ct. 2993, 3009-17, 61 L.Ed.2d 739 (Stewart, J., concurring; Powell, J., concurring); Schneckloth v. Bustamonte, 412 U.S. 218, 250, 93 S.Ct. 2041, 2059, 36 L.Ed.2d 854 (1973)(Powell, J., concurring): Kaufman v. United States, 394 U.S. 217, 231, 89 S.Ct. 1068, 1976, 22 L.Ed.2d 227 (1969)(Black, J. dissenting). See also United States ex rel Barksdale v. Blackburn, 616 F.2d 254 (5th Cir. 1981)(en banc); Friendly, Is Innocence Irrelevant? Collateral Attack on

ineffective assistance at the trial level. It argues that proceedings on appeal are different and that ineffective assistance at that level does not constitute fundamental unfairness. This poses a false hypothesis and draws a distinction not found here. No appellate court ever obtained jurisdiction of Perez's case, for no appeal was taken. His counsel's wrongful conduct occurred entirely in the trial court. We need not, therefore, consider the standards that would apply to the quality of representation before an appellate court. See, e.g., Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981).

Finally, the state retreats to an attempt to differentiate between the trial

Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970). See generally Note, Guilt, Innocence and Federalism in Habeas Corpus, 65 Cornell L.Rev. 1123 (1980).

and the lodging of an appeal because the state initiates the criminal trial and thus embroils the defendant, but the initiative to appeal is on the defendant. The issue is not where the initiative lies, for the defendant must raise any defenses at trial and counsel's failure to raise a particular defense may well make him ineffective. The question rather is whether the conduct of the criminal proceeding, considered as a whole, was fundamentally unfair. Here it was. The appeal is the vehicle by which violations of the right to a fair trial, conducted in accordance with law, may be remedied. Therefore, the failure to file a timely appeal as promised, without more, constitutes a violation of the Sixth Amendment and Perez must be accorded an out-of-time appeal.

For these reasons, the petition for rehearing is DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 78-1346

D. C. DOCKET NO. 76-2219-CIV-SMA

ANTONIO PEREZ,

Petitioner-Appellee,

versus

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before MORGAN, FAY and RUBIN, Circuit Judges.

JUDGMENT ON REMAND FROM THE UNITED STATES SUPREME COURT

This cause came on to be heard on remand from the Supreme Court of the United States;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the said District Court in this cause be and the same is hereby affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

October 8, 1980

ISSUED AS MANDATE:

Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-417

LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT
OF CORRECTIONS,

Petitioner,

vs.

ANTONIO PEREZ,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BENNETT H. BRUMMER
Public Defender

and

KAREN M. GOTTLIEB
Assistant Public Defender
Eleventh Judicial Circuit
of Florida
1351 Northwest 12th Street
Miami, Florida 33125

Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO. 81-417

LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT
OF CORRECTIONS,

Petitioner,

vs.

ANTONIO PEREZ,

Respondent.

REASONS FOR NOT GRANTING THE WRIT

THE DECISION BELOW IS IN HARMONY WITH THE DECISIONS OF EVERY CIRCUIT COURT AND IS COMPELLED BY THE HOLDING IN CUYLER V. SULLIVAN, 446 U.S. 335 (1980).

A

The factual components of respondent's habeas corpus claim are not in dispute. Respondent has continuously desired to invoke the state appellate machinery for review of his conviction since the date upon which his judgment and sentence were entered. Respondent's counsel deceived respondent by promising that an appeal would be taken and deceived the state trial court by falsely announcing in open court that the necessary written

notice of appeal had in fact been filed. Since counsel had not filed the notice of appeal, and since counsel never was to file a notice of appeal, the thirty day appellate time period elapsed, unbeknownst to respondent. And with this passage of thirty days, respondent's right to an appeal was unknowingly lost.

The state appellate tribunal held respondent accountable for the trangressions of counsel; the court refused to grant a belated appeal. Respondent's detrimental reliance and lack of fault were never contravened. Rather, the critical factor was that respondent had been deceived by "private" counsel. This abandonment by counsel was punished by the deprivation of an appeal.

Upon these facts, the federal district and circuit courts concurred that a fundamental miscarriage of justice had occurred. The district court, in granting the writ of habeas corpus, specifically found counsel's unconscionable conduct and the consequent deprivation to have rendered the state proceedings fundamentally unfair:

> [The] active course of conduct on the part of private counsel, can only be characterized, at the very least, as a willful disregard for the responsibility placed upon him by the system, which served only to insure the deprivation of petitioner's appellate rights. Such unconscionable actions languish to the level of conduct of counsel "so grossly deficient as to render the proceedings fundamentally unfair."

Perez v. Wainwright, 440 F.Supp. 1037, 1044 (S.D.Fla. 1977) (Original emphasis).

And the United States Court of Appeals for the Fifth Circuit, notwithstanding the reversal of the grant of relief, took pains to make clear its own predilections:

> What is or is not "fundamental unfairness" cannot of course be identified by litmus. Ultimately the characterization is visceral and emotional. Indeed the very term "fundamentally unfair" has pejorative overtones. Were we approaching the issue for the first time, we would hold, as did the district judge, that, when a lawyer, by definition a member of a learned profession and a member of the bar of the court, does not perform his promise to his client that an appeal will be taken, fairness requires

that the deceived defendant be granted an out-of-time appeal.

Perez v. Wainwright, 594 F.2d 159, 163 (5th Cir. 1979).

The ultimate reversal by the circuit court of the grant of relief was deemed required under the dual standard then drawn by the Fifth Circuit between retained and appointed counsel ineffectiveness claims.[1] This "state action" dichotomy was the progeny of the en banc decision of Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). The Fitzgerald majority had declared a more onerous burden for defendant's raising ineffectiveness of counsel claims where counsel was retained rather than appointed. Id. at 1335-1337. The opinion of Judge Godbold, concurring in part and dissenting in part, had urged that one who employs his own counsel should not be penalized for such action by having a lower standard of effectiveness applied to gauge counsel's actions; state action is provided by the regulation by the state of both the criminal justice machinery and the lawyers operating therein. Id. at 1345-1346.

This Court has now issued its mandate of equality to govern all ineffectiveness of counsel claims. Citing with approbation both the opinion of Judge Godbold in Fitzgerald v. Estelle and the decision in West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973),[2] which was vacated at 510 F.2d 363 (5th Cir. 1975)(en banc) and remanded in the aftermath of Fitzgerald, the Court proclaimed:

> A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for

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1 It is indisputable that the Fifth Circuit had routinely ordered belated appeals for state defendants who were deprived of direct appellate review due to the derelictions of appointed counsel. See, e.g., Daniels v. Alabama, 487 F.2d 887 (5th Cir. 1973); Foxworth v. Wainwright, 449 F.2d 317 (5th Cir. 1971); Rought v. Henderson, 445 F.2d 662 (5th Cir. 1971); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

2 In the original opinion in West, the court had declared:

> To "administer justice without respect to person, and do equal right to the poor and to the rich" we must apply the same standard, whether counsel be court-appointed or privately retained. 478 F.2d 1026, 1033 (5th Cir. 1973)(footnote omitted)

> whom the State appoints counsel.... We see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.

Cuyler v. Sullivan,[3] 446 U.S. 335, 344-45 (1980).

Application of this Cuyler proclamation following the vacatur and remand ordered by this Court provided the circuit court the opportunity to adopt the holding which had previously been precluded by Fifth Circuit law.[4]

> Therefore, we now hold, as announced by way of dictum in our first opinion, that "when a lawyer, by definition a member of a learned profession and a member of the bar of the court does not perform his promise to his client that an appeal will be taken, fairness requires that the deceived defendant be granted an out-of-time appeal." Perez v. Wainwright, 594 F.2d 159, 163 (5th Cir. 1979).

Perez v. Wainwright, 640 F.2d 596, 598 (5th Cir. 1981).

Petitioner now asserts that the decision of Cuyler v. Sullivan has no impact upon this case. Ignoring the very essence of Cuyler -- the requirement of equal justice -- petitioner argues that ineffectiveness of counsel claims must be scrutinized under a different standard where appellate counsel rather than trial counsel is at issue.

Yet, even prior to the decision in Cuyler, all of the circuit courts save the Fifth Circuit, have routinely ordered belated appeals for defendants deprived of the right to appeal through wrongdoings of counsel, be it appointed or retained. See, e.g., Leventhal v. Gavin, 421 F.2d 270 (1st Cir. 1970), cert. denied, 398 U.S. 941 (1970); Desmond v. United States, 333 F.2d 378 (1st Cir. 1964); United States ex rel. Maselli v. Reincke,

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[3] Indeed the holding in Cuyler was presaged by the Court's recognition in Ferri v. Ackerman, 444 U.S. 193, 100 S.Ct. 402, 407 n.17 (1979), that retained and appointed counsel are to be in equipoise in both their responsibilities and controls.

[4] The court, in upholding the grant of relief in the aftermath of Cuyler v. Sullivan, acknowledged:

> Each federal circuit court, even before the Cuyler proclamation of equality, has, under varying circumstances, recognized a denial of due process to defendants whose right to appeal is lost through wrongdoings or neglect of counsel.

640 F.2d at 598 n.3 (citations omitted).

383 F.2d 129 (2d Cir. 1967); United States ex rel. O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970); Shiflett v. Commonwealth of Virginia, 447 F.2d 50 (4th Cir. 1971)(en banc), cert. denied, 405 U.S. 994 (1972); Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968); Chapman v. United States, 469 F.2d 634 (5th Cir. 1972); Atilus v. United States, 406 F.2d 695 (5th Cir. 1969); Byrd v. Smith, 407 F.2d 363 (5th Cir. 1969); Boyd v. Cowan, 519 F.2d 182 (6th Cir. 1975); Rosinski v. United States, 459 F.2d 59 (6th Cir. 1972); Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971); Benoit v Wingo, 423 F.2d 880 (6th Cir. 1970), cert. denied, 400 U.S. 852 (1970); Macon v. Lash, 458 F.2d 942 (7th Cir. 1972); Calland v. United States, 323 F.2d 405 (7th Cir. 1963); Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970), cert. denied, 401 U.S. 1002 (1971); Williams v. United States, 402 F.2d 548 (8th Cir. 1968); Riser v. Craven, 501 F.2d 381 (9th Cir. 1974)(en banc); Sanders v. Green, 488 F.2d 478 (9th Cir. 1973); Gairson v. Cupp, 415 F.2d 352 (9th Cir. 1969); Jackson v. Turner, 442 F.2d 1303 (10th Cir. 1971); Wynn v. Page, 369 F.2d 930 (10th Cir. 1966); Hannigan v. United States, 341 F.2d 587 (10th Cir. 1965); Dillane v. United States, 121 U.S.App.D.C. 354, 350 F.2d 732 (D.C. Cir. 1965).[5]

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[5] The state courts have been receptive to defendants' requests for belated appeals where the right to appeal has been initially forsaken through the ineptitude of privately-retained counsel. See, e.g., Finnie v. State, 582 S.W.2d 19 (Ark. 1979); Moultrie v. State, 542 S.W.2d 835 (Tenn. Crim.App. 1976); Ex parte Raley, 528 S.W.2d 257 (Tex. Crim.App. 1975); Hopkins v. Hooper, 234 Ga. 236, 215 S.E.2d 241 (1975); Erb v. State, 332 A.2d 137 (Del. 1974); People v. Serrano, 33 Cal.App.3d 331, 109 Cal.Rptr. 30 (3d DCA 1973); State v. Scott, 492 S.W.2d 168 (Mo.App. 1973); State ex rel. Bratcher v. Cooke, 188 S.E.2d 769 (W.V. 1972); Shipman v. Gladden, 453 p.2d 921 (Or. 1969)(en banc); People v. Brown, 39 Ill.2d 307. 235 N.E.2d 562 (1968).

This Court, acting in its supervisory capacity, has also acknowledged the propriety of the grant of a belated appeal where a defendant in a federal criminal case alleges that his retained counsel fraudulently deprived him of his right to appeal. Rodriguez v. United States, 395 U.S. 327 (1969); cf. Gaca v. United States, 411 U.S. 618 (1973)(criminal appeal would be reinstated where dismissal was due to the failure timely to pay the requisite filing fee and the defendant suffered from the mistaken belief that payment was unnecessary due to the grant of leave to appeal in forma pauperis). Moreover, where a federal defendant has relied to his detriment upon false promises of court-appointed counsel that a timely certiorari would be initiated, the Court has followed the recommendation of the Solicitor General and facilitated a timely petition for writ of certiorari. Wilkins v. United States, 441 U.S. 468 (1979).

The underlying notion that rules of procedure are means to an end and not ends in themselves finds support in the American Bar Assocation Standards which advocate a flexible administration of appellate time limitations. ABA Standards, Criminal Appeals § 2.1 (1970); Post-Conviction Remedies § 2.2 (1968).

In finding a due process violation where a defendant represented by private counsel is deprived of an appeal due to counsel's derelictions, the courts have focused upon the post-judgment responsibility of trial counsel, whose representation proves ineffective when the defendant's appellate right is foregone.[6] The result of the ineffectiveness, enforcement by the state of an unknowing forefeiture of the right to appeal, clashes with fundamental fairness where liberty is at stake.

The touchstone, the essential role of trial counsel during the post-judgment stage, was articulated by the Court of Appeals for the Fourth Circuit in Nelson v. Peyton, 415 F.2d 1154, 1157 (4th Cir. 1969), cert. denied, 397 U.S. 1007 (1970):

> [W]e think that counsel is also required in the hiatus between the termination of trial and the beginning of an appeal in order that a defendant know that he has the right to appeal, how to initiate an appeal and whether, in the opinion of counsel, an appeal is indicated. This interim is a critical, crucial one for a defendant because he must make decisions which may make the difference between freedom and incarceration.

The court subsequently in Shiflett v. Commonwealth of Virginia, 447 F.2d 50, 53 (4th Cir. 1971)(en banc), cert. denied, 405 U.S. 994 (1972), further elaborated upon the responsibilities of trial counsel, whether appointed or retained, to protect the defendant's right to appeal. The analysis of the court which acknowledges the need for a defendant's personal assertion or forefeiture of the right to appeal, simultaneously elucidates why former agency theories precluding retained counsel claims are uniquely inapposite to the situation at bar:

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[6] The obligation which devolves upon trial counsel to protect the appellate right has been explicitly set forth in the standards promulgated by the American Bar Assocation. A.B.A. Standards, Criminal Appeals: Transition from Trial Court to Appellate Court § 2.2 (1970); The Defense Function AFter Conviction §§ 8.2, 8.3 (1971).

The general proposition, that the duties of trial counsel continue long after judgment is pronounced, has also been endorsed by the Florida courts, Coleman v. State, 215 So.2d 96, 100-101 (Fla. 4th DCA 1968); Smith v. State, 192 So.2d 346, 349 (Fla. 2d DCA 1966).

> In requiring as part of any competent trial representation that a lawyer inform his client fully of his appeal rights, Nelson [v. Peyton, supra,] is in accord with the trend of recent decisions recognizing that although matters of strategy and tactics are principally for the lawyer to determine, the decision to exercise or forego a guaranteed right is for the defendant alone to make. Ibid

The Fourth Circuit therefore requires that a belated appeal be granted a deceived defendant who has reasonably but detrimentally relied upon retained counsel to protect the guaranteed right to appeal. Id at 55 [approving Weatherman v. Peyton, 433 F.2d 124 (4th Cir. 1970), Williams v. Coiner, 392 F.2d 210 (4th Cir. 1968)].

Similar reasoning has led the Sixth Circuit to hold that a defendant cannot be deprived of an appeal as a consequence of an abandonment by private counsel. Woodall v. Neil, 444 F.2d 92 (6th Cir. 1971). That court has concluded that in such a case, there is "no knowing, intelligent and intentional relinquishment" of the right to an appeal. The requirements of due process are consequently violated by the refusal of a state appellate court to grant such a deceived defendant a requested out-of-time appeal. Boyd v. Cowan, 519 F.2d 182, 184 (6th Cir. 1975).[7]

The Court of Appeals for the Ninth Circuit has equally affirmed the constitutional compulsion for a belated appeal where retained counsel's ineffectiveness deprives a defendant of the means to appeal. Cairson v. Cupp, 415 F.2d 352 (9th Cir. 1969). The court made clear that it is not only allegations of false promises on the part of counsel that establish the right to an out-of-time appeal. For irrespective of fraud, trial counsel is charged with the solemn responsibility of protecting a client's right to appeal. Thus, the court held that, while an attorney has no affirmative duty to represent a trial client on appeal, he or she does have the obligation of either insuring that an appeal is lodged, or advising a client on how to proceed in the client's

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[7] The proposition that an attorney cannot wantonly disavow the assumption of responsibility once assumed is enshrined in the American Bar Assocation Code of Professional Responsibility, Ethical Consideration 2-32; Disciplinary Rule 2-110(a)(2).

own behalf:

> Were we to hold that the constitutionally protected right to the assistance of effective trial counsel ended at the moment sentence was pronounced, we would leave many criminal defendants suspended between counsel with the result that direct appeal, otherwise available, would be lost and the time consuming process of post-conviction proceedings would be begun. This is precisely what has happened in this case. The failure of appellant's trial counsel to preserve his client's statutory right to appeal resulted in a deprivation of the assistance of effective trial counsel. Id. at 353-354 (citations omitted)

Employing similar logic, the Eighth Circuit in Blanchard v. Brewer, 429 F.2d 89 (8th Cir. 1970), cert. denied, 401 U.S. 1002 (1971), repudiated the propriety of the artificial distinction drawn between retained or appointed counsel, simple or gross negligence, where forfeiture of an appeal is the end result:

> "The failure to perform the simple procedure of timely filing a notice of appeal is not the 'effective' assistance of counsel required by Powell v. Alabama [287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158], nor the diligent advocacy required by Anders v. California [386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed. 493]. The failure of counsel to timely file a notice of appeal after he has been requested or agreed to do so is incompetence as a matter of law and a denial of due process. This is equally true whether the negligent counsel has been appointed or retained. The 'invidious discrimination' is not between the rich who can hire counsel and the poor for whom counsel must be appointed, but between those who are represented by competent counsel and those whose counsel prove to be grossly incompetent or culpably negligent." Id. at 90-91 [quoting Shipman v. Gladden, 453 P.2d 921, 925 (Or. 1969)]

Accordingly, the court graphically denounced the state's refusal to grant a belated appeal to the petitioner represented by private counsel as effecting a classification so invidious "as to shock the conscience and consequently to violate due process":

> Indeed, failure by appointed or retained counsel to commence the simple steps for appeal is a blatant denial of due process. (citations omitted). Distinctions between gross or simple negligence on the part of counsel, or between retained or appointed counsel, or between

> active or passive negligence on the part of the state are immaterial. Whether counsel's conduct is classified as gross or excusable negligence or whether the state's activity is classified as passive or active is irrelevant, since in either case appellee has been denied effective and complete appellate review through no fault of his own. Ibid at 90

The grant of an out-of-time appeal contravenes none of the traditional policy concerns which militate against relief for ineffectiveness of private counsel claims. No premium is placed upon inadequate representation;[8] no burden is laid upon trial courts to supervise possible ineffective conduct. United States ex rel. Maselli v. Reincke, 383 F.2d 129, 133 (2d Cir. 1967). With the claim stripped of issues of aquiescence or stratagems, former justifications for overlooking inadequacies of private counsel become particularly obsolete:

> The State tells us that relieving defendants of responsibility for the sort of misconduct of their chosen counsel which transpired here will invariably "***put a premium on incompetent and inefficient counsel whose mistakes could be more certainly relied upon as effective aid for reversal than the sound and competent advice and trial conduct of the most efficient counsel." Popeko v. United States, 294 F.2d 168, 171 (5th Cir. 1961). We do not share this belief. As we have already observed, relator does not suffer here from counsel's tactical or strategic errors, the detection of which would impose upon the courts the intolerable burden of inquiring into counsel's designs at every stage in the proceeding.... Here, counsel's post-trial conduct contrary to his client's wishes is not attributable to the accused, who was unconscionably prejudiced thereby. Fundamental fairness requires that he be granted the rights which were lost to him through no fault of his own. Id. at 133-134 (citations and footnotes omitted).

The penultimate consideration is thus the total deprivation. The grant of an out-of-time appeal to a defendant previously denied a direct appeal does not provide "two bites at the appeal."

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[8] Indeed, rather than fostering a premium on ineffective counsel, the grant of relief to petitioner would only alleviate Florida's current premium on court-appointed counsel.

Defendants accorded belated appellate scrutiny receive only that which was preliminarily thwarted through the unethical representation of their trial counsel.

Petitioner attempts to distinguish Cuyler from the case at bar by ignoring the deprivation at issue. Petitioner argues that there is no constitutional right to an appeal, and, in any event, counsel is relatively insignificant on appeal.[9] (Petition at 18-21).

Yet, respondent has not claimed a due process violation because the State of Florida does not provide for appellate review,[10] and has not challenged the effectiveness of counsel's representation on appeal. Respondent's claim has as its foundation the refusal by the State of Florida to accord him access to its appellate court solely because the trial counsel who failed to perfect his appellate right was private, not appointed. Had counsel for the impecunious respondent not been remunerated by respondent's parents, but instead by the state, it is certain that respondent's plea for a belated appeal would not have gone unheeded. See, e.g., State v. Wooden, 246 So.2d 755 (Fla. 1971); Baggett v. Wainwright, 229 So. 239 (Fla. 1969); Powe v. State, 216 So.2d 446 (Fla. 1968).[11]

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[9] The argument of petitioner that the role of counsel is less significant on appeal than at trial since the appellate courts independently scrutinize trial records for error is inapposite. Absent the grant of the writ of habeas corpus, respondent would receive no appellate review of his conviction with or without counsel. The discussion by petitioner regarding the role of appellate counsel and courts would be appropriate if the State of Florida was amenable to the grant of a belated appeal, but only opposed the representation by counsel, or by effective counsel. Then, the appellate court could provide appellate review, albeit without benefit of an appellate advocate. But see Anders v. California, 386 U.S. 738 (1967).

[10] In Florida, a direct appeal in criminal cases is guaranteed by both the state constitution and state statute. See Noble v. State, 353 So.2d 819 (Fla. 1977); Marshall v. State, 344 So.2d 646 (Fla. 2d DCA 1977); Bannerman v. Wainwright, 283 So.2d 124 (Fla. 1st DCA 1973); § 924.06, Fla. Stat. (1979).

[11] This unfairness in Florida procedure is underscored by the fact that the State of Florida, while denying belated direct appeals where retained counsel is at fault, grants untimely applications for discretionary certiorari review and untimely appeals from orders denying collateral post-conviction motions to vacate judgment where the delay is attributable to appointed counsel. See, e.g., Pressley v. Wainwright, 367 So.2d 222 (Fla. 1979); Flores v. Wainwright, 240 So.2d 816 (Fla. 2d DCA 1970), O'Malley v. Wainwright, 237 So.2d 813, 817 (Fla. 2d DCA 1970).

While appeals are not constitutionally required, once provided, open and equal access is a constitutional requisite:

> This Court has never held that the States are required to establish avenues of appellate review but it is now fundamental that once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.

North Carolina v. Pearce, 395 U.S. 711, 724-725 (1969)(citations omitted).[12]

Indeed, since the 1894 declaration in McKane v. Durston, 153 U.S. 684, that appeals are not constitutionally dictated, appellate review of criminal judgments has become an integral part of the American system of criminal justice. Griffin v. Illinois, 351 U.S. 12, 18-19 (1956); see also Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). As early as 1956, this Court noted with approval that "all of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." Griffin v. Illinois, supra at 18 (1956).[13]

Because of the significant role of the criminal appeal in rectifying trial error, this Court has not countenanced any state practice which impinges upon equal access to complete appellate review. See, e.g., Williams v. Oklahoma City, 395 U.S.

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[12] Petitioner's contention, that the deprivation of appellate review is not fundamentally unfair since respondent can pursue a collateral attack of his conviction, offers an unconscionable impediment for defendants such as Perez. Florida law is clear: a post-conviction motion is not a substitute for appeal, the scope of review on a collateral attack is far more circumscribed than that provided on a direct appeal, and a post-conviction motion can present to the trial court only claims which could not have been presented on direct appeal. See, e.g., Berriel v. Wainwright, 290 F.Supp. 699 (S.D.Fla. 1968); Witt v. State, 387 So.2d 922 (Fla. 1980); Battle v. State, 388 So.2d 1323 (Fla. 5th DCA 1980); Tolar v. State, 196 So.2d 1 (Fla. 4th DCA 1967); Swindle v. State, 202 So.2d 132 (Fla. 3d DCA 1967). Indeed, in Witt v. State, supra at 927-28, the Supreme Court of Florida expressly declined to adopt the federal standard of review for collateral attacks articulated by this Court in Davis v. United States, 417 U.S. 333 (1974), as the federal standard of review was deemed unnecessarily broad.

The argument of petitioner that the avenue of relief for Respondent Perez should be limited to a collateral attack certainly urges an intolerable penalty for counsel's defalcation.

[13] In recognition of the utility of the state appellate system as a means of vindication of constitutional rights, the Court has entrusted litigation of significant constitutional claims to the state tribunals. Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

458 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); Griffin v. Illinois, supra.[14] Penalties for the exercise of the appellate right have not been tolerated. Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 711 (1969).[15] And past impediments to full appellate review of criminal cases have been retroactively condemned by the Court to avert "the clear danger of convicting the innocent." Tehan v. United States, 382 U.S. 406, 416 (1966); accord, Stovall v. Denno, 388 U.S. 293, 297-298 (1967).

In the final analysis, the state's enforcement of respondent's criminal judgment, deprivation of liberty, and rejection of respondent's plea for appellate review is unconscionable. Upholding a forfeiture of an appeal due to counsel's failure "to invoke the procedural and substantive safeguards that distinguish our system of justice", is repugnant to due process. See Cuyler v. Sullivan, 446 U.S. at 343; see also McMann v. Richardson, 397 U.S. 759, 770-771 (1970).

The State of Florida, having provided an appellate avenue, must now fulfill the due process promise of fair access to the appellate courts. Boddie v. Connecticut, 401 U.S. 371, 378 (1971). It is now beyond peradventure that once a state provides for appellate scrutiny,

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[14] The importance of the first direct appeal to "a correct adjudication of guilt" has been more recently underscored by the decisions of the Court which have refused to extend safeguards attendant to the first appeal to subsequent discretionary and collateral review proceedings. United States v. MacCollum, 426 U.S. 317, 323-326 (1976); Ross v. Moffitt, 417 U.S. 600, 605-617 (1974).

[15] Even in the civil context, the Court has been receptive to claims that state burdens imposed upon the exercise of the statutory right to appeal are constitutionally offensive. See, e.g., Lindsey v. Normet, 405 U.S. 56 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971).

> the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining the question of alleged deprivation of his life or liberty contrary to the 14th Amendment.

Frank v. Mangum, 237 U.S. 309, 327 (1915).

See also Presnell v. Georgia, 439 U.S. 14 (1978); Cole v. Arkansas, 333 U.S. 196, 201 (1948); United States ex rel. Mishkin v. Thomas, 282 F.Supp. 729 (S.D.N.Y. 1968). Scrutiny of the processes by which respondent has been deprived of his liberty inexorably leads to the conclusion that due process has been denied. Evisceration of respondent's right to an appeal as the result of counsel's abdication of his solemn duty, is "shocking to the universal sense of justice." Betts v. Brady, 316 U.S. 455, 462 (1942).

The steadfast refusal of the State of Florida to provide redress to individuals represented by private counsel does violence to this Court's most recent declaration that "the often uninformed decision to retain a particular lawyer" cannot forfeit the defendant's entitlement to constitutional protection. Cuyler v. Sullivan, supra at 344:

> Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every American court."

Griffin v. Illinois, 351 U.S. 12, 17 (1956) [quoting Chambers v. Florida, 307 U.S. 227, 241 (1940)].

Fairness and equality, the ultimate mandates of Cuyler v. Sullivan, are no less applicable in this case. The petition for writ of certiorari should be denied.

B

Petitioner also advances, as an additional basis for certiorari jurisdiction, that the standard of review for ineffectiveness of counsel claims such as that advanced by respondent must now be resolved. This contention, first raised by petitioner some five years after the commencement of litigation in this cause, is equally misguided. The standard of review which controls the case at bar has been well explicated in the decisions of this Court.

Indeed, the decision asserted by petitioner as being in conflict with the decision at bar elucidates the precedential lineage for the holding of the court below. In United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1979)(en banc), the court noted that prejudice need not be shown for every deprivation of counsel claim. Analyzing ineffectiveness of counsel decisions of this Court against a continuum, the DeCoster Court noted at one end the "cases of structural or procedural impediments by the state that prevent the accused from receiving the benefits of the constitutional guarantee." Id. at 201. Where there has been some deprivation of the right to counsel, as opposed to allegations of ineffective actions by counsel, no other prejudice need be affirmatively established. Id. at 201-203; see Holloway v. Arkansas, 435 U.S. 475 (1978); Geders v. United States, 425 U.S. 80 (1976); Herring v. United States, 422 U.S. 853 (1975); Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970); Glasser v. United States, 315 U.S. 60 (1942); Avery v. Alabama, 308 U.S. 444 (1940); Powell v. Alabama, 287 U.S. 45 (1932). In contradistinction, where counsel's performance is assailed, a "non-categorical approach" with prejudice as its focus is dictated. Id. at 203.

The DeCoster Court articulated the bases for requiring a showing of prejudice in cases challenging the quality of representation of counsel. Absent such a requirement, courts would be forever questioning judgment calls by counsel, and inquiring as to clients' concurrence with tactical decisions of the defense attorney. As a result, the sensitive relationship between counsel

and client would be undermined, and the adversary system transformed into a system almost inquisitorial in nature. Id. at 208.

The claim of respondent places no premium on ineffective counsel and imposes no burden of inquiry upon the court.[16] As the United States Court of Appeals for the Second Circuit observed in United States ex rel. Maselli v. Reincke, supra, tactical decisions of counsel are not at issue in a case such as this. Consequently, the policy questions attendant to ineffective representation cases pose no obstacle. The relief sought, the one appeal forfeited only by the derelictions of counsel, is consistent with basic fairness and taxes little costs on the administration of justice.

The costs associated with the remedy sought has been the subject of analysis by this Court when considering the need for a showing of prejudice. In requiring no showing of actual prejudice in Rose v. Mitchell, 443 U.S. 545 (1979), the Court contrasted those cases where the grant of relief requires exclusion of probative evidence or immunity from prosecution, with cases where the grant requires only a new trial. In a case such as this, where the remedy is merely the direct appeal guaranteed by state law, the administration of justice is only furthered by a grant of relief.

In the final analysis, the burden which petitioner advocates, a pre-relief showing of merit to the appeal, is contrary to the precedent of this Court as well as the raison d'être of the DeCoster decision.[17] Moreover, the decision sought to be

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16 In contrast, the burden placed upon the federal courts pursuant to the prejudice standard asserted by petitioner is an onerous one. In assessing the likely merit of the appellate arguments, the federal court would be required to scrutinize the trial transcripts and decipher all pertinent state law.

17 In Rodriguez v. United States, 395 U.S. 327, 330 (1969), this Court refused to require a preview of the appellate issues from a similarly deprived defendant, explaining:

> Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in those proceedings.

reviewed is in precise accordance with the decisions of each and every court of appeals. In light of the total harmony among the circuits, and the manifest propriety of the resolution reached by the court below, the petition for writ of certiorari should be denied.

CONCLUSION

The decision sought to be reviewed is consistent with the law of every federal circuit, and compelled by the holding in Cuyler v. Sullivan. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE SUPREME COURT IN THE UNITED STATES

OCTOBER TERM, 1981

NO: 81-417

LOUIE L. WAINWRIGHT,
SECRETARY, DEPARTMENT OF
OFFENDER REHABILITATION,

Petitioner,

vs.

ANTONIO PEREZ,

Respondent.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46(1) of the Rules of this Court, motion is hereby made that the petitioner be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was mailed to the Office of the Attorney General, 401 N.W. 2nd Avenue, Miami, Florida, 33132, this 25th day of November, 1981.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 N.W. 12th Street
Miami, Florida 33125

BY: Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1981

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LOUIE L. WAINWRIGHT, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

ANTONIO PEREZ,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Antonio Perez, being first duly sworn, depose and say that I am the respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made below relating to my ability to pay the cost of prosecuting the cause. are true.

I have previously been adjudicated insolvent by the Circuit Court for the Eleventh Judicial Circuit of Florida, in and for Dade County, and the Office of the Public Defender for the Eleventh Judicial Circuit has been appointed to represent me in this cause.

On December 14, 1976, the United States District Court for the Southern District of Florida granted me leave to proceed in forma pauperis and on February 19, 1980, this Court granted my motion to proceed in forma pauperis in the former certiorari proceeding in this cause.

I am presently employed for Peterson Industries, 4935 E. 10th Ct. Hialeah; FL 33013. I earn $4.35 per hour and my average monthly wages are $600.

I have not, within the past twelve months, received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources.

I do not own any cash or checking or savings account.

I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

Those dependent upon me for support are my wife, Ida Perez, who is also employed, and my son, Antonio Perez, Jr.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Antonio Perez
ANTONIO PEREZ

Duly witnessed and sworn to before me,
a Notary Public, this 13½ day of
November, 1981.

Notary Public

Notary Public, State of Florida
My Commission Expires Nov. 6, 1984
Bonded Thru Troy Fain-Insurance, Inc.